Supreme Court, U.S.
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No. 85-976

In the Supreme Court of the United States

OCTOBER TERM, 1985

DEBORAH BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOP A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends primarily (at 9-15) that the government's in camera submission of documents to the district court for a determination whether they should be produced under *Brady* v. *Maryland*, 373 U.S. 83 (1963), deprived her of due process.

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on nine counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of presenting false statements to a federally insured bank, in violation of 18 U.S.C. 1014. She was sentenced to concurrent terms of two years' imprisonment on five of the wire fraud counts, to be followed by five years' probation on the remaining counts. She was also

ordered to make restitution of $5 million, subject to certain conditions. The court of appeals affirmed. Pet. App. 1-9.[1]

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner, a commodities broker, was the intermediary for a sale of 6,000 tons of black beans from a supplier in Hong Kong to a Guatemalan government agency. Pursuant to the sales contract, the buyer arranged for a $5 million letter of credit, to be paid to petitioner upon her submission of documents showing that the beans had been loaded on a vessel in Hong Kong. Petitioner submitted the required documents and obtained the funds. She and her co-defendants had forged the papers, however, and no beans were in fact shipped to Guatemala. Pet. App. 1-2.

Early in the trial, the government submitted to the district court, in camera, a report compiled by the Federal Bureau of Investigation concerning information supplied by a confidential source, James Gunnells. Although the government believed that the material was inculpatory, it made the report available to allow the district court to determine whether it should be produced pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). Pet. App. 8; 2/24/83 Tr. 40. The district court concluded that the report was not discoverable; the court stated that it "intend[ed] to ignore th[e] document in totality" and was "not going to credit [it] one wit." *Id.* at 17, 42-43.

2. Petitioner contends (Pet. 9-15) that the in camera submission of the FBI report deprived her of due process by

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[1]Petitioner's co-defendants Robert L. Tucker and Michael Ball similarly were convicted on all ten counts, and their convictions also were affirmed on appeal.

prejudicing the district judge.[2] When a prosecutor has any doubt concerning the defendant's right to material under *Brady* or the Jencks Act, 18 U.S.C. 3500, courts have consistently recommended and approved the practice of submitting the material to the district court for an in camera determination of whether it should be produced. See, *e.g.*, *United States* v. *Dupuy*, 760 F.2d 1492, 1501 (9th Cir. 1985); *United States* v. *Darby*, 744 F.2d 1508, 1525 (11th Cir. 1984), cert. denied, No. 84-1260 (May 13, 1985); *United States* v. *Holmes*, 722 F.2d 37, 41 (4th Cir. 1983) ("[I]t would be the prosecutor's obligation to submit any material to the district court in camera if he had any doubts about whether it might be exculpatory."). Faced with a long and complicated trial, the prosecutor was justifiably concerned to avoid the inadvertent commission of reversible error. Accordingly, "the government acted prudently" in providing the material to the district court for its evaluation. Pet. App. 8.[3]

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[2]Petitioner, who is white, also contends (Pet. 16-17) that the government's use of peremptory challenges to strike four black veniremen from the jury violated her right to an impartial jury. Although the question of the propriety of a prosecutor's consideration of race in exercising peremptory challenges is currently pending before the Court in *Batson* v. *Kentucky*, No. 84-6263 (argued Dec. 11, 1985), there is no need to hold this petition for the decision in that case, because there is here no factual basis for the claim. Both the district court (12/6/82 Tr. 81-82) and the court of appeals (Pet. App. 9) concluded that the peremptory challenges were exercised on the basis of the veniremen's lack of education rather than their race. See generally, *e.g.*, *United States* v. *Campbell*, 766 F.2d 26 (1st Cir. 1985). This concurrent finding of fact by the courts below obviously does not merit review by this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, No. 83-1007 (Jan. 9, 1985), slip op. 7-8 n.5. We note as well that the court of appeals denied co-defendant Tucker's petition for rehearing (see Pet. 16-17 n.9) on December 5, 1985.

[3]Petitioner now contends (Pet. 12 n.6) that the material could not possibly have been exculpatory or otherwise discoverable. In both the district court (2/24/83 Tr. 22) and the court of appeals (Appellant's Br. 7), however, petitioner argued that the report should have been

Petitioner's claim of prejudice was appropriately characterized by the court of appeals as "a ridiculous suggestion." Pet. App. 8. The district court repeatedly made it clear that it "absolutely [would] not rely on th[e] information." 2/24/83 Tr. 25; page 2, *supra*. As the court of appeals concluded, "[w]e trust our judges to preside impartially over trials in which they know much that the jury does not know adverse to the defendants; there is no indication that the district judge failed to do his duty in this case." Pet. App. 8. If petitioner believes that certain of the district court's evidentiary rulings at trial were erroneous (Pet. 14-15), she should have presented that question directly in her petition rather than making a bare allegation that the rulings were the product of bias on the part of the trial judge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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produced to her. It was to avoid just this possibility of second-guessing that the government properly submitted the material to the district court for its evaluation.

Petitioner also suggests (Pet. 10 & n.3) that the government attorneys acted unethically in submitting the material to the district court. The amicus curiae statement referred to by petitioner, which the court of appeals refused to accept, contained no allegation of unethical conduct. We have been informed by the United States Attorney's Office that there are no disciplinary proceedings pending against the prosecutors in this case.

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